

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor

PUBLIC UTILITIES COMMISSION

SAN FRANCISCO, CA 94102-3298



August 26, 2005

VIA FAX AND FIRST CLASS MAIL
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Fair Political Practices Commission
428 J Street, Suite 620
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COMMENTS ON PROPOSED REGULATION 18722
ITEM 11 ON THE FPPC'S SEPTEMBER 1 AGENDA

I am writing on behalf of the Legal Division of the California Public Utilities Commission (CPUC) to present our comments on proposed Regulation 18722. I am the lead attorney in the CPUC's Legal Division who provides conflict of interest advice to the CPUC's employees and Commissioners. While we appreciate the efforts of the FPPC staff to provide greater clarity with regard to when a person "assumes office," is "appointed" to an office, or "leaves office" for the purpose of filing Statements of Economic Interests, we find considerable ambiguity in the proposed Regulation, and suggest that the FPPC try to achieve greater clarity in the proposed Regulation before adopting it. The following are our more specific comments.

DATE OF ASSUMING OFFICE

Both options for proposed 18722(a)(1) include the language "is authorized to serve in the position, as by being sworn in". Pursuant to Government Code sec. 18151, most state civil service employees need not be sworn into office until the end of 30 days from commencing employment. By suggesting that being authorized to serve in the position is the same as being sworn in, this proposed language causes some confusion with regard to state civil service employees and does not provide adequate guidance. Proposed subdivision (a)(1)(B) (in Option 2) could cause further confusion in this situation. For example, consider a civil service employee who is not sworn in until 30 days after beginning work, and spends the first several weeks in training during which time the employee has no opportunity to make, participate in making, or influence a governmental decision. Does such an employee assume office on the day she begins work, the day she is sworn in, or some intermediate date on which she begins participating in governmental decisions?

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We suggest that something like the following would provide greater clarity, and still preserve the basic concept contained in the *Aramburu* Advice Letter:

(1) The date of assuming office is: (A) for an elected official who is required to be sworn into office, the date the official is sworn in; (B) for all other persons: (i) the date the person is authorized to perform the duties of the position; or (ii) the date the person begins to perform the duties of the position by making, participating in making, or attempting to use his or her official position to influence a governmental decision; whichever occurs earlier.

We hope this suggestion makes it clear that for an ordinary civil service employee the date of assuming office is the "start" date.

DATE OF APPOINTMENT

We also find the definition of the date of appointment in proposed Regulation 18722(a)(2) to be problematic in the case of new Commissioners. CPUC Commissioners are "appointed" by the Governor and subject to confirmation by the State Senate. (See California Constitution Article XII, Section 1.) Now, the date of appointment seems clear, it is the date the Governor signs the appointment papers. Under the proposed Regulation, however, the date of "appointment" would be the date that the new Commissioner "has accepted an offer of appointment" from the Governor. We are not aware of any formal method by which a proposed Commissioner "accepts" an "offer of appointment" from the Governor. Thus this new definition would cause ambiguity as to the appointment date.

Furthermore, under this definition, the date of "appointment" might be construed as referring to the date on which the new Commissioner tells the Governor that she is willing to serve, which typically happens before the formal appointment is made. In that case, a gubernatorial appointee would be required to disclose, for example, investments that had been fully divested before the individual had any opportunity to perform any of the duties of office. Such a result would not seem to serve any purpose. Indeed, in the case of a Commission vacancy occurring at the end of a Commissioner's term, it is possible that the Governor may have lined up a candidate and the candidate may have accepted the offer before the position is actually vacant. We do not think that it is reasonable for the date of appointment to occur before the position is vacant, especially given the 10 day time period within which a new Commissioner has to file her assuming office statement. The problems with the proposed definition are further illustrated by the following situation that occurred recently: the proposed Commissioner had told the Governor he was willing to serve in the position, the Governor issued a press release stating his intention to appoint the individual, however, that individual was never actually appointed to the position, the position remained vacant for some time, and another individual was ultimately appointed.

In short, whatever definition of the "date of appointment" the FPPC adopts to help clarify situations that are now unclear, we recommend that it not introduce ambiguity into situations that

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are now clear, as where there are official appointment papers for a gubernatorial appointee subject to Senate confirmation.

DATE OF LEAVING OFFICE

With regard to the date of leaving office, the language actually proposed for subdivision (b) does not seem as clear as the discussion in the FPPC staff memo of August 10th, and also does not answer some of the questions we have faced in providing advice to CPUC employees.

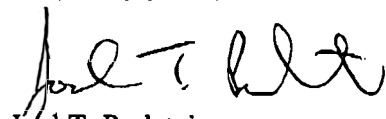
The staff memo says that a person leaves office when she stops performing the duties and walks out the agency's door, never to return again, and that continuing to receive pay for accrued vacation does not change this result. (Staff memo at 6.) However, staff's preferred option says that the individual leaves office on the date "that the person is no longer authorized to perform the duties of the office *and* stops performing those duties" (emphasis added). This formulation suggests that a person who walks out the door never to return again, but still has a legal right to the position (e.g., because she is still taking accrued vacation time) has not yet left office; which is not what the staff memo seems to recommend.

Furthermore, the proposed regulation does not answer the questions we have had about retired annuitants. For example, when does a person who retires with the expectation of continuing to work as a retired annuitant file a leaving office statement? This question is especially difficult if it is not clear when (if ever) the person will actually be performing work as a retired annuitant. Another problem with determining when a retired annuitant must file a leaving office statement occurs at the far end, as it is often difficult to know when a retired annuitant who has been working for the agency will not be doing any more work in the future.

CONCLUSION

In conclusion, we thank you for your consideration of our views, and hope that the FPPC will be able to clarify much of the ambiguous language in the current draft before it approves proposed Regulation 18722.

Very truly yours,



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